NZLR

**NOT RECOMMENDED**

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.32/96

THE QUEEN

v

B

**Coram:** Gault J
Tompkins J
Anderson J

**Hearing:** 24 June 1997 (at Auckland)

**Counsel:** G M Illingworth for Appellant
K Raftery and C M O'Connor for the Crown

**Judgment:** 24 June 1997

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## JUDGMENT OF THE COURT DELIVERED BY TOMPKINS J

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The appellant was charged with attempted murder, wounding with intent to cause grievous bodily harm, and aggravated robbery, each together with a person unknown. Following a trial before a jury he was, on 13 December 1995, found not guilty of the attempted murder charge and guilty of the other two. On 2 February 1996 he was sentenced to nine years imprisonment on each of those charges. He has appealed against conviction.

**Background**

At about 20 past midnight on 22 October 1993, the appellant, his brother B and , went to the Mobil service station on the corner of Barrys Point Rd and Anzac St, Takapuna. They bought some food and left by taxi.

Just after 2 am the service station was robbed by two men each armed with a knife. In the course of the robbery the attendant was stabbed, resulting in

serious injury. $185.45 was stolen. The service station attendant described one of the robbers as Caucasian, the other as Maori.

Police dogs led the police to a flat occupied by the appellant, his brother and Mr Barrett. On the track between the service station and the flat there was located a red jacket. In the flat the police located clothes including a black T shirt, exhibit 11. Later DNA analysis of blood located on the red jacket and on the black T shirt identified it as blood from the victim.

At the trial the issue was identification. The defence sought to call evidence from Mr McEwan, a plastic and reconstructive surgeon with a particular interest in photographic imaging as applied to medical treatment. The defence wished to lead from him evidence that the face and a hand of the robber that appeared in photographs taken from a video camera at the service station was not the same as photographs of the face and hand of the appellant. The trial Judge disallowed this evidence on the grounds that it was not an appropriate subject matter for expert evidence, but was rather a matter for the jury to determine from its own observations.

**The grounds of appeal**

When the appeal first came before this Court on 29 July 1996, three grounds were relied upon.

1. There was a miscarriage of justice occasioned by virtue of the refusal of the Legal Services Subcommittee to grant legal aid approval to instruct forensic experts in Sydney, Australia.

2. The learned trial judge wrongly refused to allow the defence to call as an expert witness, Christopher Neill McEwan.

3. There was a miscarriage of justice there being fresh evidence as contained in the affidavit of Christopher Neill McEwan which might reasonably have led to a verdict of not guilty.

In a minute of the Court issued that day, it directed that legal aid be granted to the appellant because of the importance and significance of issues raised in the appeal, particularly under the first ground.

When the appeal came back before the Court today, for reasons that will emerge shortly, the first and second grounds were not proceeded with. The third ground was amended to rely on new evidence contained in affidavits by Mr McEwan and in a report by Dr Vintiner of the ESR.

**The McEwan evidence**

There have been filed two affidavits sworn by Mr McEwan. It is unnecessary to relate the contents in detail. He has deposed that his attention has been drawn by Mr Rogers, then counsel for the appellant, to an article by Professor Vanezis of the Department of Forensic Medicine and Science of the University of Glasgow entitled "Facial Image Comparison Of Crime Suspects Using Video Superimposition" published in (1996) 36 (1) *Science and Justice* 27. Mr McEwan then employed the technique to the case of Mr B Using a photograph of Mr B supplied by a professional photographer, who has also sworn an affidavit, he compared that image with the image shown on the service station video. The comparison related specifically to the nose, eye brow, forehead and shape of head. He expressed the conclusion that the superimposition video image examination shows identifiable differences and inconsistencies between the available material from the robber, and the photographic material obtained from Mr B

**The Vintiner evidence**

The report from Dr Vintiner was obtained by the Crown. It related particularly to the analysis of findings on the T shirt. It confirmed the previous evidence that the blood on the T shirt originated from the victim. This was consistent with evidence given at the trial. But Dr Vintiner also carried out DNA tests from possible perspiration areas on the T shirt, which she had not done when she gave evidence at the trial. This evidence was obviously relevant to whether or not the T shirt located in the flat had been worn by the appellant in the robbery. Evidence had been given by the Detective Constable who located the T shirt, that it was damp and had the sweaty smell of after football practice.

Dr Vintiner expressed her conclusion in these terms:

> From the STR profiles obtained from the possible perspiration areas from the armpit and neckband of the T shirt, it was determined that

> DNA from Mr B could not be detected in these samples. The results indicated that DNA from more than one person was present on the T shirt. I am unable to confirm or deny the proposition that Mr B wore the T shirt.

## Submissions

Mr Raftery for the Crown accepted that both the evidence from Mr McEwan and from Dr Vintiner relating to the DNA testing of the perspiration areas, was not available at the trial and was evidence cogent to the issue relating to the appellant's conviction. He also accepted that for this reason it was appropriate to order a new trial.

Mr Illingworth submitted that the conviction should be quashed and no new trial ordered. He invited the Court to consider the evidence in Mr McEwan's two affidavits and further evidence in a video he sought to show the Court with a view to the Court concluding that the Maori robber shown in the photograph was not the appellant. He also invited the Court to consider that Dr Vintiner's evidence relating to the DNA testing of the perspiration areas provided further support for the contention that the appellant had not been the wearer of the T shirt on the night of the robbery. If these two findings of fact were made, he submitted there was then insufficient evidence to justify the Court ordering a new trial.

Mr Illingworth accepted that having regard to other evidence given at the trial, the Maori robber was either the appellant or his brother. It was his submission in the light of the findings he invited the Court to make, that there was insufficient evidence to prove that it was the appellant.

## Conclusion

We are not prepared to make either of those factual findings. First, the Crown has had insufficient opportunity to consult its own experts on the tests carried out by Mr McEwan, and in particular the technique that he employed and the conclusions that he drew. That opportunity must be given. It will be for the Judge to determine whether the technique is appropriate for expert evidence and admissible, and if it is, it will be for the jury to decide whether, having observed the tests Mr McEwan carried out, and having heard any evidence in rebuttal called by the Crown, it is prepared to accept his conclusion.

Secondly, the report from Dr Vintiner is lacking in some essential detail. She found in the passage to which we have referred, that DNA from more than one person was present on the T shirt. What she has not said is whether she can positively exclude the appellant as one of the persons from whom that DNA came, or whether it could have been the appellant, even if his DNA could not positively be identified. The former increases the likelihood that the appellant was not wearing the T shirt although even then it will not expressly exclude it. The latter would render her evidence of DNA perspiration findings neutral.

**The result**

The appeal is allowed, the convictions quashed, and a new trial is ordered. As will be clear from what has already been stated, we make no findings on the further evidence from Mr McEwan and from Dr Vintiner. It may well be appropriate for the admissibility of Mr McEwan's evidence to be determined on an application under s 344A. We also confirm that, possibly depending on the result of that application, the appellant may apply for a discharge under s 347, at which stage the Judge before whom it comes will be able to consider the evidence of Mr McEwan, of any expert the Crown proposes to call, and any further report obtained from Dr Vintiner, as well as other evidence in the depositions, in order to determine whether the appellant should stand trial.

**Solicitors:**
A G V Rogers, Auckland for Appellant
Crown Solicitor, Auckland for Crown